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MISSION CREEP IN MILITARY LAWYERING

Elizabeth L. Hillman *

I. INTRODUCTION

When we study military lawyers as legal professionals we may be seeing too much of what they used to do—run a specialized criminal justice system—and not enough of what they do now: everything required to keep war-fighting legal. Prosecuting courts-martial and defending servicemembers accused of crime is a small part of the docket for twenty-first century judge advocates.¹ They also staff the military commission system—minted in 2001 and draining experienced litigators from other missions ever since—and provide legal assistance to servicemembers, but even those important tasks consume only a small fraction of military legal resources.² Most of military lawyering involves advising commanders on the legal dimensions of operations, sometimes termed “operational law.”³ And there is far more military lawyering than there used to be. Even in a period of military drawdown, the pace of growth in the legalization of military operations is likely to sustain an increasing corps of judge advocates.⁴

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¹ See INDEPENDENT REVIEW PANEL TO STUDY THE JUDGE ADVOCATE REQUIREMENTS OF THE DEPARTMENT OF THE NAVY FINAL REPORT i, 2–3 (2011) [hereinafter REVIEW PANEL REPORT]. This report, drafted at the direction of Congress through the 2010 National Defense Authorization Act, provides an overview of the Department of the Navy and Marine Corps’ manpower requirements (not the military generally). The report provides useful information necessary to fulfill the judge advocates’ legal mission within the Department of the Navy while contemplating military-wide support needs.

² See REVIEW PANEL REPORT, *supra* note 1, at x (pointing out that the Department of the Navy is required to provide 30 Navy judge advocates and 13 Marine judge advocates to the Office of Military Commissions).

³ *Id.* at 3–4 (estimating that 65 % of the Navy JAG corps practice is dedicated to operational law). See discussion on operational law *infra* Part III.

⁴ See, e.g., Lieutenant Colonel Jeff A. Bovarnick, *Foreword*, THE ARMY LAWYER, June 2010, at 1, available at http://www.loc.gov/rr/frd/Military_Law/pdf/06-2010.pdf. “There is no indication that the number of deployed JAs will decrease any time soon. Although the U.S. mission in Iraq will expire at the end of 2011, the number of JAs deploying to Afghanistan is increasing.” *Id.*

Practicing operational law poses an under-appreciated challenge to the professional identity of the growing body of military lawyers. Judge advocates are a critical bulwark against the risk of the United States military and civilian forces abusing their authority and taking illegitimate actions.⁵ Because of the expansive missions of the twenty-first century United States armed forces, operational law asks judge advocates to perform a vast range of roles that frequently overlap, diverge, and grow.⁶ Many judge advocates during the last decade, by any standard of professional ethics, have acquitted themselves extraordinarily well in spite of (or perhaps because of) the challenges of managing “a dual professional identity as military officers and lawyers.”⁷ They have rejected calls to torture, stressed the importance of maintaining the rule of law in fighting terrorism,⁸ zealously represented detainees at Guantánamo Bay,⁹ and responsibly navigated tensions between military and state rules of ethics.¹⁰ Yet their multiplying roles create conflicts at least as deep and vexing as the frequently studied issue of judge advocates defending detainees before military commissions.¹¹

⁵ See, e.g., Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 410 (2011) (“But it is the actions of lawyers, particularly before and in the absence of trial, that has the most pervasive influence on the development of the law. Legislatures and courts intervene interstitially, and on rare occasion quite powerfully, but their pronouncements would be empty without the countless and largely confidential acts of counseling by lawyers. This occurs primarily through private lawyers advising clients about whether and how to comply with law, but also, and at least as importantly, through government lawyers in their decisions about whether and how to enforce the law as well as their advice to agencies and the President on the proper boundaries of executive branch action.”).

⁶ REVIEW PANEL REPORT, *supra* note 1, at v (“Judge advocates are playing an ever increasing role in the complex legal and policy environments that currently confront, and will continue to confront, operational commanders.”).

⁷ David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981 (1999). See also *infra* Part II.

⁸ See, e.g., Laura Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT'L L. 1 (2010) (detailing the role of judge advocates as compliance officers).

⁹ See, e.g., Matthew Ivey, *Challenges Presented to Military Lawyers Representing Detainees in the War on Terrorism*, 66 N.Y.U. ANN. SURV. AM. L. 211 (2010) (assessing the performance of judge advocates representing detainees).

¹⁰ See, e.g., C. Peter Dungan, *Avoiding “Catch-22s”: Approaches to Resolve Conflicts Between Military and State Bar Rules of Professional Responsibility*, 30 J. LEGAL PROF. 31 (2006) (describing various conflicts between state ethical rules and military rules).

¹¹ See David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 1998–2004 (2008) (detailing the conflicts of interest challenges faced by judge advocates defending detainees facing military commissions); but see Major General Charles J. Dunlap, Jr. & Major Linell A. Letendre, *Military Lawyering and Professional Independence in the War on Terror: A Response to David Luban*, 61 STAN. L. REV. 417 (2008); David J. R. Frakt, *The Myth of Divided Loyalties*, article in this symposium issue (arguing that judge advocates

Since the military became a permanent United States institution during the Cold War, the American armed forces have remained large and military operations common, even in times of relative peace.¹² The U.S. military does not demobilize and it does far more than fight. It occupies and pacifies; guards and builds; researches and studies; analyzes and teaches.¹³ Lawyers in uniform support each of these disparate and sometimes conflicting missions.¹⁴ Judge advocates run elections and approve bombing targets, train soldiers on the rules of engagement and prosecute them for violating the laws of war, write contracts for construction projects, secure courtrooms, set rules for detention facilities, compensate civilians injured by military operations, and perform a thousand other tasks unified only by the fact that it is the U.S. military that is undertaking them.¹⁵

The potential impact of mission creep, or the “gradual, unauthorized broadening” of an original mission,¹⁶ on the American military and its lawyers should not go unacknowledged. In military lawyering, mission creep is embedded in the widely accepted structural shift away from military justice into operational law.¹⁷ The shift toward operational law began before 2001, but it has accelerated substantially during the last decade.¹⁸ It has the potential to undermine the coherent norms that are at the heart of stable professional identities.

When we ask our lawyers in uniform to practice not only military criminal law, but also every type of law in service of every conceivable

involved in military commissions were not negatively affected by a clash of loyalties to country and client).

¹² See, e.g., ELIZABETH LUTES HILLMAN, *DEFENDING AMERICA: MILITARY CULTURE AND THE COLD WAR COURT-MARTIAL* 8 (2005).

¹³ See generally, DEP’T OF DEF., *QUADRENNIAL DEFENSE REVIEW REPORT* (2010) (describing the varied roles of U.S. military forces against al-Qaeda and its allies).

¹⁴ Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 27–39 (2003) (discussing five scenarios in which conflicts of interest may arise).

¹⁵ See *infra* Part III.

¹⁶ BRIAN W. BLAESSER, *DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE DISCRETION* (2d. ed. 2008), preface. See also *infra* Part IV.

¹⁷ See, e.g., Michael A. Newton, *Modern Military Necessity: The Role & Relevance of Military Lawyers*, 12 ROGER WILLIAMS U. L. REV. 877, 880 (2007); Luban, *supra* note 11, at 99.

¹⁸ FREDERIC L. BORCH, *JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI* (2d ed., 2001) (2008) (documenting the institutionalization of operational law in the army’s judge advocate general’s corps). Christopher Behan’s review in the *Military Law Review* noted that Borch’s book was more quickly distributed and widely available among judge advocates than the 2002 Manual for Courts-Martial – which is the “bible” of military criminal law. See Christopher W. Behan, 174 MIL. L. REV. 180, 181 n.10 (2002); see also Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939, 1118–119 (1998) (describing the legalization of military operations prior to the war on terrorism).

military objective, we create an expanding set of duties that sprawl well beyond easily definable professional roots. The breadth of current U.S. military operations combined with the legalization of virtually every aspect of armed conflict has handed military lawyers an ethical challenge of daunting proportions. They risk being bound not by the rules that generally govern lawyers in their representation of clients but instead by what Norman Spaulding might term a “thick” identification with the military itself.¹⁹ When a military lawyer has to do everything that the military needs—at an historical moment in which the United States asks the military to do everything—only the individual fortitude of judge advocates may prevent them from waging “lawfare,”²⁰ in which law becomes not a brake on authority or respect for process, but instead a means of achieving a military goal.

II. IMAGE

Before sketching what military lawyers do and suggesting the ethical challenges of that canvas, we ought to have some sense of who judge advocates are and how they are perceived within the legal profession. The public image of military lawyers tends toward the sterling, and not only because of the handsome actors of recent and long-running television hits starring judge advocates and military criminal investigators.²¹ Military lawyers have been celebrated of late in both American popular culture and legal scholarship because of their role in upholding humanity in warfare amidst the ethical failures of other government attorneys.

Since 2001, judge advocates have stood up, sometimes to their own professional detriment, against legal opinions that threatened to undermine

¹⁹ Spaulding, *supra* note 14, at 26 (“[T]hick identity may lead to lawlessness, a temptation to go beyond the boundaries of lawful conduct in order to advance a client’s interests. Here, a lawyer’s affinity with the person or positions of her client may make her willing to do too much for the client, more than the role and applicable law permit, more perhaps than her client does or should want.”).

²⁰ On “lawfare,” loosely defined as the weaponization of law, or its use as a means of waging war, see Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*, Carr Center for Human Rights Policy, Harvard Kennedy School, Program on National Security and Human Rights, Workshop Papers, “Humanitarian Challenges in Military Intervention” (2001) (offering a definition and popularizing the term). This term has generated a robust and ongoing debate; see, e.g., Jack Goldsmith, Robert Chesney, and Benjamin Wittes, *LAWFARE* (2011), <http://www.lawfareblog.com/>.

²¹ See *JAG*, INTERNET MOVIE DATABASE (last visited Apr. 14, 2011), <http://www.imdb.com/title/tt0112022/> (describing “JAG”, which aired for ten seasons from 1995–2005) and *NCIS: Naval Criminal Investigative Service*, INTERNET MOVIE DATABASE (last visited Apr. 14, 2011), <http://www.cbs.com/primetime/ncis/> (describing “NCIS” as entering its seventh season).

the rule of law. They rejected the torture of detainees,²² limited the targets of bombs,²³ and defended those detained in the war against terrorism.²⁴ They did not concur, and were barely consulted, in the creation of the much-criticized military commissions at Guantánamo Bay.²⁵ Their demonstrated commitment to respecting the constraints imposed by the laws of war serves as an historical counterpoint to the heedlessness of lawyers of the executive branch under the Bush Administration.²⁶ One of those lawyers, John Yoo, co-authored an article with coast guard lawyer Glenn Sulmasy that suggested the restraint counseled by judge advocates undermined essential civil-military relations in the United States.²⁷

Institutional assessments of the judge advocate generals' corps suggest that military lawyers were better equipped by training and institutional placement to withstand the legal detours taken by lawyers in the political branches. Analyses rooted in organizational culture stress the way in which military values and the integration of military lawyers into operational units (or "co-mingling of accountability agents and operational employees") enabled judge advocates to object to orders that they considered unlawful and persuade others to comply with their decisions.²⁸ Retired general

²² See, e.g., Dick Jackson, *Interrogation and Treatment of Detainees in the Global War on Terror*, in MICHAEL W. LEWIS et al., *THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* 126 (2009).

²³ See, e.g., Heinz Klug, *The Rule of Law, War, or Terror*, 2003 WIS. L. REV. 365, 371–72, 377–79 (2003) (contrasting targetings by military commanders that have input from military lawyers with targetings by C.I.A. personnel).

²⁴ See, e.g., Frakt, *supra* note 11.

²⁵ See, e.g., JANE MAYER, *THE DARK SIDE* 88–89 (2008); JACK GOLDSMITH, *THE TERROR PRESIDENCY* 121–22 (2007); Charles J. Dunlap, Jr., *A Tale of Two Judges: A Judge Advocate's Reflections on Judge Gonzales's Apologia*, 42 TEX. TECH L. REV. 893, 897–899 (2010) (detailing how judge advocates were marginalized during the Bush administration).

²⁶ See, e.g., Deborah N. Pearlstein, *Ratcheting Back: International Law as a Constraint on Executive Power*, 26 CONST. COMMENT. 523, 546 n.79 (2010) ("Military lawyers in particular pushed back vigorously against Bush Administration efforts to avoid the strictures of the Geneva regime."); Michael P. Scharf, *The Torture Lawyers*, 20 DUKE J. COMP. & INT'L L. 389, 400 (2010); Richard C. Schragger, *Cooler Heads: The Difference Between the President's Lawyers and the Military's*, SLATE.COM, Sept. 20, 2006, <http://www.slate.com/id/2150050/?nav/navoa> (arguing that military lawyers conceive of the law in a way more conducive to compliance with the laws of war); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SECURITY L. & POL'Y 455, 462–63 (2005) (pointing out public rejection of the torture memo).

²⁷ See Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815 (2007); but see Victor Hansen, *Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations*, 50 S. TEX. L. REV. 617, 649–52 (2009) (critiquing the Bush Administration's position that "everything changed").

²⁸ Laura A. Dickinson, *Military Lawyers, Private Contractors, and the Problem of International Law Compliance*, 42 N.Y.U. J. INT'L L. & POL. 355, 365; 359–72 (2010) (arguing

Charles Dunlap echoes many uniformed lawyers in lauding the importance of military training in the success of judge advocates: "JAGs, like all military officers, are trained to think strategically, and thinking strategically is essential to successfully waging war within the Constitution."²⁹ Others go so far as to suggest that military officers, despite being part of a culture that mandates obedience and deep respect for hierarchy, are expected to question the decisions of others³⁰ and that the decentralized nature of military operations encourages the occasional departure from precedent, thus avoiding the perpetuation of error.³¹ Overall, the scholarly response to the post 9/11 actions of judge advocates has portrayed them as agile and principled in adapting to a remarkably difficult legal climate.³²

The image of judge advocates did not escape the first decade of the United States' war against terror completely untarnished, however.³³ The 2005 Haditha massacre, in which twenty-four Iraqis were killed by U.S. Marines, was marred not only by the extra-legal violence that led to so many civilian deaths, but by a cover-up initiated by commanding officers and a failure to convict any of the officers involved, including a Marine judge advocate, because of unlawful command influence during the aftermath.³⁴ In 2004, the world was shocked by the photographs of sexualized

that judge advocates have largely internalized norms of international law, in part through a well-developed organizational culture); Gregory S. McNeal, *Organizational Culture, Professional Ethics and Guantanamo*, 42 CASE W. RES. J. INT'L L. 125, 149 (2009).

²⁹ Dunlap, *supra* note 25, at 901.

³⁰ See, e.g., Thomas W. Taylor, *The Fifteenth Hugh J. Clausen Lecture in Leadership: Leadership in High Profile Cases*, 204 MIL. L. REV. 343, 354 (2010) ("In fact, military lawyers arguably have a greater obligation than most soldiers and civilians to raise questions about authority because of the hierarchical rank structure of a military organization that does not always appreciate or encourage questions, the special staff relationship that military lawyers have with their commanders, and our responsibility as licensed attorneys to uphold the rule of law.").

³¹ John C. Dehn, *Institutional Advocacy, Constitutional Obligations, and Professional Responsibilities: Arguments for Government Lawyering Without Glasses*, 110 COLUM. L. REV. SIDEBAR 73, *88 (2010).

³² See, e.g., Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, 51 VA. J. INT'L L. 549, 634–635 (2011) ("The American experience in Iraq, however, has been a story of constant adaptation in which changing perceptions of the strategic environment induced both policy and legal change.").

³³ See Eugene R. Fidell, *Transparency*, 61 HASTINGS L.J. 457, 471 (2009) (pointing out that Philip Alston, U.N. Human Rights Council Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, called on the United States in 2008 to take action to stop unlawful killings).

³⁴ See Melissa Epstein Mills, *Brass-Collar Crime: A Corporate Model for Command Responsibility*, 47 WILLAMETTE L. REV. 25, 39–45 (2010) (detailing the crimes and investigations stemming from the Haditha incident); see also Dickinson, *supra* note 28, at 372.

abuse and torture emerging from the U.S. military prison at Abu Ghraib.³⁵ Military lawyers participated in the ensuing investigations and prosecutions and were not directly blamed for creating the climate that led to such egregious misconduct, despite the lack of effective oversight that made the detention facility such a free-for-all. In fact, some asserted that had judge advocates' advice not been dismissed by the executive branch attorneys, the incident could have been avoided altogether.³⁶ Even so, the image of military lawyers suffered along with that of all of the U.S. military with the revelations of detainee abuse.³⁷

Image aside, there is also some evidence that the traditional core of judge advocates' work, the U.S. court-martial, is operating less effectively than most lawyers have realized. Like Professor Chesney's article on detention policy, Major Rosenblatt's work relies on after-action reports to reconstruct the legal climate of military operations on the ground.³⁸ Rosenblatt, an Army Judge Advocate, concludes that the court-martial system—the much-celebrated cornerstone of American military law—is failing to function effectively in combat operations.³⁹ This empirical evidence suggests that a closer look at the assumed success of military legal operations is warranted.

III. MISSION

Our JAG Corps mission is a powerful force enabler: we deliver professional, candid, independent counsel and full spectrum legal capabilities to command and the warfighter. The Air Force, like other Services, operates in an increasingly legalistic environment, which demands nothing less than the very best legal capability it can field. The Air Force JAG

³⁵ See Mills, *supra* note 34, at 45–49 (detailing the legal response and accountability after the Abu Ghraib scandal); see also Diane Marie Amann, *Abu Ghraib*, 53 U. PA. L. REV. 2085, 2133–138 (2005).

³⁶ See, e.g., Dunlap, *supra* note 25, at 903–904.

³⁷ See, e.g., Hansen, *supra* note 27, at 655 (noting the high cost of the Abu Ghraib scandal in the war against terrorism).

³⁸ Major Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, 2010-SEP ARMY LAW. 12 (2010).

³⁹ *Id.* at 12–13 (2010) (“By any measure—numbers of cases tried, kinds of cases, reckoning for servicemember crime, deterrence of other would-be offenders, contribution to good order and discipline, justice, or the provision of a meaningful forum for those accused of crimes to assert their innocence or present a defense—it cannot be said that the American court-martial system functioned effectively in Afghanistan or Iraq. In an era of legally intensive conflicts, this court-martial frailty is consequential and bears directly on the success or failure of our national military efforts.”).

*Corps supplies that demand with its talented and highly trained group of legal professionals.*⁴⁰

The website of the Air Force Judge Advocate General's Corps trumpets the Corps' mission statement and motto ("wisdom, valor, justice").⁴¹ It also supports links to articles like "The Brave New World of Cyberspace," "A JAG on Capitol Hill" (first-hand narratives of air force judge advocates in action), and multi-color advertisements for "JAG Corps 21" (air force legal services in the twenty-first century).⁴² Each branch of the service has invested heavily in internet public relations and recruiting; the sophistication and glitz of the Air Force law-related pages is hardly an anomaly among official military internet sites. The rhetoric of the Air Force JAG corps mission statement reflects the rising status of military lawyers throughout the armed forces. "Full spectrum legal capabilities" in an "increasingly legalistic environment" may not ring like "duty, honor, country." But, those phrases reveal the centrality of law to contemporary military operations.

The extent to which law is now embedded in military command decisions is difficult to overstate. The range of judge advocates' duties reflect this reality. For example, the Army's field manual on legal support emphasizes the integration of judge advocates into Army units and describes the army lawyer's responsibilities as practicing both operational law and six "core legal disciplines": administrative law, civil law, claims, international law, legal assistance, and military justice.⁴³ The manual is written with a sense of urgency and importance; virtually every paragraph notes growing needs, greater numbers, and more complexity—in missions, operations, and laws. It warns of the increasing pace of military operations, suggesting that judge advocates must rush desperately to catch up. They must become "increasingly refined as soldiers and lawyers," "more involved in the military decision-making process in critical planning cells," and must expand "legal support to meet the mission demands of a force projection army."⁴⁴ They have to figure out how to communicate in a "fluid and technologically advanced environment" even as they support the families of servicemembers, navigate the intricacies of multi-national operations, and "integrate democratic values into Army operations."⁴⁵ In short, they must do everything.⁴⁶

⁴⁰ *The Judge Advocate General's Corps United States Air Force*, U.S. AIR FORCE (last visited Apr. 14, 2011), <http://www.afjag.af.mil/>.

⁴¹ U.S. Air Force, *VALUES AND VISION 3*, <http://www.afjag.af.mil/shared/media/document/AFD-080502-052.pdf> (last visited Apr. 14, 2011).

⁴² See *supra* note 40.

⁴³ DEP'T OF THE ARMY, *FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS* [hereinafter FM].

⁴⁴ *Id.* at 1.4.1.

⁴⁵ *Id.* at 1.4.2.

The Navy corps describes its legal practice as encompassing “military justice, international and operational law, admiralty law, environmental law, administrative law (which itself includes diverse sub-practice areas such as command relationships, legislation, military personnel law, installation law, FOIA/Privacy Act, and ethics), general litigation, claims, legal assistance, information operations, and intelligence law.”⁴⁷ Military justice is estimated to constitute one-fifth of the practice of naval judge advocates, legal assistance fifteen percent, and operational law and command advice (a full sixty-five percent of Navy lawyers’ efforts) the rest.⁴⁸ Legal resources in the Department of the Navy are also stretched by the demands of a new disability evaluation system for wounded, ill, and injured servicemembers, by the scarcity of judge advocates who have tried complex and serious courts-martial (because of a decline in the court/-martial rate), and the need for judge advocates to staff the Office of Military Commissions.⁴⁹ The complex lines of authority that intertwine the various service JAG corps with the office of general counsel in each respective department (of the Army, Navy, and Air Force) are too intricate for even the most detailed of organizational charts.⁵⁰

Other observers’ classifications reveal the capacious, complex duties of military lawyers as well. Michael Newton describes judge advocates as taking on different roles as the situation requires, acting as “trainers, ne-

⁴⁶ Or, more specifically, *see id.* at 1.5, Summary (“The judge advocate in the 21st Century must adapt the traditional role to a more demanding, complex, fluid, international, and technological environment. The judge advocate must continue to be a master of all core legal disciplines, and must be effective in the roles of judge, advocate, ethical advisor, and counselor. The judge advocate will succeed in the new environment by becoming increasingly knowledgeable as soldiers and lawyers, maintaining constant awareness of the operational situation and communication with technical supervision and support, and integrating constitutional and international democratic values into military operations.”).

⁴⁷ REVIEW PANEL REPORT, *supra* note 1, at 3 (citing the U.S. DEP’T OF NAVY, SEC’Y OF NAVY INSTR. 5430.27C, RESPONSIBILITY OF THE JUDGE ADVOCATE GENERAL OF THE NAVY AND THE STAFF JUDGE ADVOCATE OF THE MARINE CORPS FOR SUPERVISION AND PROVISION OF CERTAIN LEGAL SERVICES).

⁴⁸ *Id.* at 3–4.

⁴⁹ *Id.* at vi, 76–77, 148.

⁵⁰ *See generally* REVIEW PANEL REPORT (showing that there is no attempt to flowchart or graph the relationships of all the navy lawyers, military and civilian, in the Navy and Marine Corps, described in these pages). Although the history of the distinctions, and contested lines of authority, between the general counsels’ offices and the service JAG’s is beyond the scope of this essay, the complexities of these historically contested relationships underlie the basic question of how judge advocates’ duties should be defined. *See* Gregory M. Huckabee, *The Politicizing of Military Law: Fruit of the Poisonous Tree*, 45 GONZ. L. REV. 611, 614–15 (2010) (analyzing the push and pull between the Department of Defense and Congress on military legal authority).

gotiators, enforcers and reporters.”⁵¹ The “rule of law” mission of judge advocates can, by itself, be an overwhelming task.⁵² Michael Lewis and his five co-authors, in a recent treatise on the law of war (and not the full spectrum of military legal operations, but only the subset related to the law of war), set out seven categories of law.⁵³ These categories encompass those concerning the armed conflict itself, the targeting of persons and property, detention, interrogation and treatment of detainees, trial, and punishment for battlefield misconduct, command responsibility, and battlefield perspectives.⁵⁴

The rise of operational law to the center of military lawyering is apparent in virtually every study or report related to the legal aspects of military operations. David Luban suggests two primary reasons for the rising prominence of operational law among: the “growing complexity of the international law of war in the last century” and the increasing importance of avoiding war crimes.⁵⁵ Despite declining budgets, the size of the military’s legal corps will continue to increase in coming years because of the pressing need for legal counsel during military operations.⁵⁶

IV. CREEP

Judge advocates do not face this mountain of responsibility without guidance, of course. The ethical obligations of military lawyers are at least as clearly articulated as those that apply to other government attorneys.⁵⁷

⁵¹ Michael A. Newton, *Modern Military Necessity: The Role & Relevance of Military Lawyers*, 12 ROGER WILLIAMS U. L. REV. 877, 880 (2007).

⁵² See, e.g., JUDGE ADVOCATE GEN.’S LEGAL CTR. AND SCH. & U.S. JOINT FORCES COMMAND, RULE OF LAW HANDBOOK: A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES i–ii (2007) (discussing the importance of Judge Advocates in planning, executing, coordinating and evaluating rule of law efforts and the lack of guidance available to Judge Advocates as they fulfill this task); see generally UNITED STATES ARMY & MARINE CORPS., U.S. ARMY & MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL (2007) (providing a counterinsurgency guideline for the Army and Marine Corps.).

⁵³ MICHAEL W. LEWIS, THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE xv–xvi (2009).

⁵⁴ *Id.*

⁵⁵ Luban, *supra* note 11, 1999.

⁵⁶ REVIEW PANEL REPORT, *supra* note 1, at v–vi. See also CENTER FOR NAVAL ANALYSES, AN ANALYSIS OF NAVY JAG CORPS FUTURE MANPOWER REQUIREMENTS, PART I: RLSOs AND NLSOs 47 (forecasting a growth rate in operational law needs of nearly 6% annually, resulting in a doubling of need in 12 years). See also REVIEW PANEL REPORT, *supra* note 1, at 17 (“The Panel recognizes the fiscal pressures on the DoD as a whole and, in particular, the requirement for the DON to cut overhead in order to sustain combat power, modernize force structure, and reset the Marine Corps.”).

⁵⁷ See, e.g., Hansen, *supra* note 27, at 662–67 (recounting the ethical rules governing government attorneys, including military lawyers).

Judge advocates undergo continuous and sophisticated training and education, have access to extensive after-action and continuity reports, and often receive attentive mentoring by more experienced military lawyers.⁵⁸ Yet this mission creep still poses threats to their professional identity.

The term “mission creep” was probably first used to describe military operations extending beyond their initial parameters; it appeared in criticism of the Korean War, the Vietnam War, U.S. operations in Somalia, and virtually every conflict since.⁵⁹ Its negative connotation is real⁶⁰ and since coming into vogue it has been broadly applied in instances of governmental over-reaching in realms outside the military.⁶¹ Mission creep implies illegitimacy, a lack of restraint, and an inevitable, undesirable, costly outcome—in short, nothing with which the U.S. military lawyer wishes to be associated.

Yet, the concept helps expose a potential risk in handing so many critical tasks to the U.S. armed forces, and in relying on judge advocates to patrol the legal boundaries of military action in realms as disparate as claims and powers of attorney, target identification and rules of engagement, space operations, and information warfare. Mission creep means that the JAG corps’ greatest needs are in environmental and international law, both of which we think of as fields governed in large part by civil, not military, norms. Can we simply ask judge advocates to manage all these duties in the same way (but better) than the general counsel’s office of a multinational corporation?

We can. In fact, we have. But because of mission creep, because we now ask U.S. forces to undertake all the tasks deemed too challenging for any other body, public or private, this means that the “military perspective” is the only glue that binds judge advocates of the various services, assigned

⁵⁸ See generally, e.g., Lieutenant Colonel Jeff Bovarnick, *Read Any Good (Professional) Books Lately?: A Suggested Professional Reading Program for Judge Advocates*, 204 MIL. L. REV. 260 (2010) (describing how important reading, across a range of fields, and continuing education is to military professionals).

⁵⁹ See, e.g., EUGENE JARECKI, *THE AMERICAN WAY OF WAR: GUIDED MISSILES, MISGUIDED MEN, AND A REPUBLIC IN PERIL* 5 (2009) (describing “mission creep” as the illegitimate expansion of U.S. military power); *Mission Creep: U.S. Military Presence Worldwide*, MOTHER JONES, <http://motherjones.com/military-maps> (last visited April 14, 2011) (documenting the extent of U.S. military operations around the globe); Michael Mechanic, *America’s Global Military Presence: Mission Creep*, GLOBAL RESEARCH (Aug. 31, 2008), <http://www.globalresearch.ca/index.php?context=va&aid=10011>.

⁶⁰ But see Adam B. Siegel, *Mission Creep or Mission Misunderstood?*, JOINT FORCES QUARTERLY 112–15 (Summer 2000), available at www.dtic.mil/doctrine/jel/jfq_pubs/1825.pdf (attempting to renovate the concept as an inevitable result of humane military operations).

⁶¹ See generally, e.g., Wendy K. Mariner, *Mission Creep: Public Health Surveillance and Medical Privacy*, 87 B.U. L. REV. 347 (2007) (documenting the expansion of public health surveillance and the risks to privacy).

to various duties, together. When judge advocates face criticism of their professional independence, they often mention, with no small amount of pride, their conviction that a commitment to the rule of law is the same as a commitment to winning wars, since the United States only wins if the rule of law is upheld.

The lack of non-military legal capacity to enforce compliance with the laws of war is especially troubling because history has shown us that democratic governments are not less, but in fact more, likely to use excessive force and cause great loss of civilian life if they stand to lose a major armed conflict.⁶² Having military lawyers in control of rule-of-law compliance does not seem a sufficient protection against this catastrophe. In addition, the very breadth of judge advocates' roles makes their identification of a client tricky, notwithstanding the services' efforts to address this issue.⁶³ Kathleen Clark has argued that government lawyers must scrutinize the structures of authority in which they operate in order to accurately identify their clients,⁶⁴ a process that is virtually impossible for a judge advocate buried in a series of crisscrossing lines of command and responsible for a veritable blizzard of operationally critical decisions regarding personnel, discipline, compliance, and so on. There are, after all—and despite the language of this essay and most commentary on matters related to the U.S. military—no “military” officers. There are army lawyers, air force lawyers, navy lawyers, coast guard lawyers—and marines. They function within units that are both too specialized—interservice rivalry is a tremendous source of waste and inefficiency—and not specialized enough.

The judge advocate must have the ear of her commanding officer in order to be effective, yet we know that legal advice is not always welcome by commanders whether in the field or in garrison.⁶⁵ Most military officers recognize their legal obligations as essential to accomplishing their missions; some are so concerned that they avoid potential legal and political embarrassment at virtually any cost, making them effective hostages to the

⁶² ALEXANDER B. DOWNES, *TARGETING CIVILIANS IN WAR* (2008). *See also* Eugene R. Fidell, *Military Justice Instruction in Civilian Law Schools*, 60 J. LEGAL EDUC. 472 (2011) (detailing the need for military legal education in law schools).

⁶³ Hansen, *supra* note 27.

⁶⁴ Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033, 1056 (2007) (“Given the wide variety of roles that government lawyers play, it is no wonder that a universal definition of the government lawyer’s client evades us. The next section develops an alternative approach. It identifies the government lawyer’s client by examining the specific context in which the government lawyer works, paying particular attention to the structure of government authority.”).

⁶⁵ *See, e.g.*, P.W. SINGER, *WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY* 390–91 (2009) (detailing the resistance of some commanding officers to the advice of judge advocates as “Monday-Morning Quarterbacking”).

advice of their experienced legal staff.⁶⁶ The relative independence of judge advocates can function in very different ways, depending on the context in which it is exercised.⁶⁷

It may be impossible to rein in mission creep, and it may be that judge advocates are in fact best situated, among the various alternatives, to play the cards they have been dealt in this high stakes game. Perhaps the answer is not a refiguring of institutions of government to balance military capacity with civil capacity; perhaps it is simply continuing to adjust and educate, to hope and aspire, to make changes at the margins. Congress could, for instance, eliminate the exemption for judge advocates from the joint service requirements of the Goldwater-Nichols Act so that military lawyers are a little less parochial and service-bound in terms of experience.⁶⁸

A recent, unsigned note in the Harvard Law Review explored the legitimacy of the U.S military justice system as it has evolved since World War II, pointing out that it “emerged as a made order with legitimacy as its organizing principle,” and that its success proved “the value of consciously adhering to a plan of design with a coherent driving principle.”⁶⁹ It seems that the twenty-first century corps of judge advocates might have lost that coherent driving principle, that the need to prove itself legitimate is no longer a relevant concern to a body of lawyers with virtually unmatched reach and responsibility.

Professional identity is bound to evolve. It is not only military lawyers who face the challenge of unclear professional norms during and after periods of change in job responsibilities and occupational structures. But the pace of change in the U.S. military is bigger, faster, and more consequential than in most other areas of practice. We have looked to judge advocates as saviors, but perhaps they are canaries in the coalmine of ever-expanding military operations and institutions. They have been telling commanders how to fight within the constraints of the laws of war, and telling the rest of us that war can be legal. But perhaps it cannot.

⁶⁶ *Id.*

⁶⁷ Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1936–37 (2008) (studying the impact of the Civil War on the role and identity of federal lawyers and exploring the contradictory meanings of independence for lawyers).

⁶⁸ All military officers, except judge advocates, are offered joint training in which they have the opportunity to familiarize themselves with the practices and personnel of other services. Goldwater-Nichols Department of Defense Reorganization Act of 1986 § 404, 10 U.S.C. § 619 (1986). An independent review panel recommended that the U.S. Navy “develop and fund a requirement for [joint professional military education] for its judge advocates.” REVIEW PANEL REPORT, *supra* note 1, at xiv.

⁶⁹ Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937, 958 (2010).